Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

STEPHEN LARI SCHLUTER,

Petitioner,

v.

STATE OF MINNESOTA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE MINNESOTA COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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64 pp

Question Presented for Review

Does the State of Minnesota violate the Ex Post Facto clause of the United States constitution when it imposes a weapons-possession ban on an individual whose offense, at the time of conviction, was not included in the list of offenses which triggered that ban?

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OPINIONS AND ORDERS ENTERED IN THIS CASE

State v. Schluter, Case No. K2-00-2901 (Ramsey Cty. Dist. Ct. October 15, 2001) (sentencing order)

State v. Schluter, 653 N.W.2d 787 (Minn. Ct. App. 2002) (conviction affirmed)

State v. Schluter, Case No. C3-04-28 (Minn. February 18, 2003) (review denied)

JURISDICTIONAL STATEMENT

This Petition follows the Order of the Minnesota Supreme Court, dated February 18, 2003, denying review of the December 10, 2002, decision by the Minnesota Court of Appeals that affirmed Petitioner's conviction. The statutory provision conferring jurisdiction on this Court to review this judgment on writ of certiorari is found at 28 U.S.C.§1257(a).

CONSTITUTIONAL PROVISION

"No Bill of Attainder or ex post facto Law shall be passed." U.S. Const. Art. I, § 9, cl. 3.

STATUTES

Minn. Stat. § 624.712 (2002):

Please see Appendix

Minn. Stat. § 624.713 (2002):

Please see Appendix

Minn. Stat. § 645.21 (2002):

Presumption against retroactive effect.

"No law shall be construed to be retroactive unless clearly and manifestly so intended by the legislature."

Statement of the Case

On May 19, 1986, Petitioner, Stephen Lari Schluter, was charged with Possession of LSD with Intent to Distribute in violation of Minn. Stat. §152.09, subd. 1(1), to which he pled guilty on July 29, 1986. He was sentenced on September 12, 1986, to five years' probation, during which time he was not permitted to possess firearms. At that time, Minnesota imposed a ten-year ban on possessing weapons *only* on those convicted of "crimes of violence." However, drug offenses were not, at that time, considered "crimes of violence;" Minnesota characterized drug offenses in this manner only beginning in 1987. The Petitioner was honorably discharged from probation for the controlled substance offense on October 1, 1991.

On September 10, 2000, a resident of St. Paul, Minnesota, reported that an individual whom she incorrectly identified as the Petitioner had pointed a pistol at her a

vehicle, and then shot at her truck. St. Paul Police proceeded to the Petitioner's residence and commenced a search. Eventually, law enforcement found two rifles and ammunition in the home, but never found the alleged pistol that precipitated the search and seizure. Furthermore, Petitioner was never charged in connection with the shooting that had allegedly occurred. The State of Minnesota has not alleged Petitioner had anything to do with those events.

On September 12, 2000, Petitioner was charged with Felony Possession of Firearm by Ineligible Person in violation of Minn. Stat. §624.713, subd. 1(b). This provision imposes a ten-year ban on possessing weapons upon those convicted of "crimes of violence," commencing with their discharge from probation. The State of Minnesota claimed Petitioner's 1986 conviction was for a "crime of violence," and that he was consequently ineligible to possess firearms between October, 1991, and October, 2001. It is not

disputed that in 1986, Petitioner's conviction was not considered a "crime of violence." Drug offenses, such as that for which Petitioner was convicted in 1986, were not considered "crimes of violence" until 1987.

Prior to trial, Petitioner moved to dismiss the charges on the ground that to do so would violate state and federal guarantees against ex post facto laws. Petitioner noted that his 1986 drug conviction was not, at that time, considered a "crime of violence" under Minnesota law. He argued that to subject him to the claimed ten-year ban on possessing weapons, which is triggered by conviction of a "crime of violence," would constitute an ex post facto application to his 1986 conviction of Minnesota's 1987 amendment to its "ineligible possession" statute, which inserted drug offenses into the definition of "crime of violence" in Minn. Stat. §624.712, subd.5. The Honorable George O. Peterson of

Ramsey County District Court denied this motion on January 24, 2001.

The court trial before the Honorable Lawrence D. Cohen, Judge of Ramsey County District Court, commenced July 10, 2001. Judge Cohen found Petitioner guilty on August 20, 2001. At sentencing, Petitioner once again pointed out that when he had been convicted in 1986, his crime was not considered a "crime of violence;" even Judge Cohen questioned whether or not Petitioner's initial drug conviction "14 years ago. . . was considered to be a crime of violence. . ." (S. 158). Nonetheless, on October 15, 2001, Judge Cohen sentenced Petitioner to one year in the workhouse with work release, stayed execution of sentence, and waived the mandatory minimum prison sentence of 60 months. Judge Cohen further stayed the sentence pending appeal and set bail at the previous amount of $15,000.

The conviction, and the denial of Petitioner's pre-trial motion, were appealed to the Minnesota Court of Appeals. In a published decision of December 10, 2002, that Court affirmed the trial court's rejection of Petitioner's *ex post facto* argument, holding that he was being punished for possessing a weapon in 2000, not for intending to distribute drugs in 1986. State v. Schluter, 653 N.W.2d 787 (Minn. Ct. App. 2002). The Court failed, however, to recognize the central issue: that Petitioner could not have been "ineligible" to possess a weapon in 2000 absent an impermissible retroactive application of Minnesota's 1987 amendment to the "ineligible persons" statute to his 1986 conviction. This issue was presented to the Minnesota Supreme Court for review, which was denied February 18, 2003. This Petition followed.

ARGUMENT

I. APPLYING A 1987 RECLASSIFICATION OF DRUG OFFENSES AS "CRIMES OF

VIOLENCE" TO PETITIONER'S 1986 DRUG CONVICTION VIOLATED THE *EX POST FACTO* CLAUSE OF THE FEDERAL CONSTITUTION.

A. Considerations Governing Review on Certiorari

This Court should grant the writ of certiorari because the facts relating to this question fit precisely within the scope of the considerations described in Supreme Court Rule 10, paragraphs (b) and (c).

First, the Minnesota Court of Appeals' treatment of this specific question directly conflicts with the decision, on virtually indistinguishable facts, by the South Dakota Supreme Court in State v. Trower, 629 N.W.2d 594 (S.D. 2001). The Trower Court held that subjecting a previously-convicted individual to a weapons-possession ban based on a post-conviction reclassification of his crime violated the *ex post facto* clause of the federal constitution.

Second, the Minnesota Court of Appeals' decision squarely conflicts with various decisions of this Court, which

hold that subsequent changes in law that increase the penalty for crimes for which a person was convicted before the amendment represent *ex post facto* violations. See, e.g,. Miller v. Florida, 107 S.Ct. 2446, 482 U.S. 423, 96 L.Ed.2d 351 (1987); Lynce v. Mathis, 117 S.Ct. 891, 519 U.S. 433, 137 L.Ed.2d 63 (1997); and in particular, Johnson v. United States, 120 S.Ct. 1795, 529 U.S. 694, 146 L.Ed.2d 727 (2000).

B. Retroactive application to Petitioner's 1986 conviction of Minn. Stat. §624.713, subd.1(b), based on 1987 amendments to Minn. Stat. §624.712, subd.5, creates an *ex post facto* violation.

The federal constitution prohibits the implementation of *ex post facto* laws. See U.S. Const. art. I, §10. "A law is *ex post facto* when it applies to events occurring before its enactment and disadvantages the offender affected by it." Weaver v. Graham, 450 U.S. 24, 29 (1981). In particular, "to constitute an *ex post facto* law, a statute must: (1) punish as a crime an act which was innocent when committed; (2)

increase the burden of punishment for a crime after its commission; or (3) deprive one charged with a crime of a defense that was available when it was committed." Collins v. Youngblood, 497 U.S. 37, 52 (1990). In contrast, statutes increasing penalties for conduct occurring after their effective dates are not considered *ex post facto* laws.

The Minnesota Court of Appeals decision in this case conflicts directly with the decision of the court of last resort in another State. The facts of State v. Trower, 629 N.W.2d 594 (S.D. 2001) are virtually indistinguishable from this case, and yet the Minnesota Court of Appeals failed to so much as acknowledge its existence. In Trower, the defendant was convicted in 1990 of felony sexual contact with a minor. Id. at 595. As in Minnesota, South Dakota law prohibits those convicted of "crimes of violence" from possessing a firearm. Id. At the time of Trower's conviction, however, "sexual contact" was not defined as

a "crime of violence" under South Dakota law. Id. "Sexual contact" was added to the definition of "crime of violence" in 1992. *Id.* at 595-96. As does Petitioner, Trower maintained that to subject him to the ban on firearm possession that is triggered by conviction of a "crime of violence," when his offense was not considered a "crime of violence" at the time of conviction, would violate *ex post facto* principles.

The South Dakota Supreme Court, relying heavily on United States v. Davis, 936 F.2d 352 (8th Cir. 1991), agreed. The Trower Court stated:

> Trower was convicted for sexual contact in 1990. In 1992, while he was still serving his sentence, the law was amended to redefine a "crime of violence" to include sexual contact with a child and to thereby prohibit Trower from bearing arms. ... Thus, just as in Davis, supra, if the 1992 law limiting the right to possess firearms was applied to a pre-1992 conviction, the effect would be to increase retroactively, in violation of the Ex Post Facto Clause, the punishment for the crime previously committed. Trower, 629 N.W.2d at 597.

It could not be more clear that the facts in Trower and in the present case are to all appearances indistinguishable. Here, in 1987, while Petitioner was still serving his sentence, the law was amended to redefine a "crime of violence" to include drug offenses and to thereby prohibit Petitioner from bearing arms. Thus, just as in Trower, if the 1987 law was applied to a pre-1987 conviction, the effect would be to increase retroactively, in violation of the *ex post facto* clause, the punishment for the crime previously committed, i.e., the 1986 drug offense.

Despite the identical nature of the cases, and despite Petitioner's evident reliance upon *Trower*, the Minnesota Court of Appeals resolved this important federal issue in a manner directly contradicting the result reached in the court of last resort in neighboring South Dakota, without so much as mentioning the case or attempting to distinguish it in any

way. Petitioner respectfully urges this Court to grant his petition for writ of certiorari on this ground.

Moreover, the Minnesota Court of Appeals decision in this case also runs afoul of at least three recent *ex post facto* decisions of this Court. In Miller v. Florida, defendant Miller had committed an act of sexual battery on April 25, 1984. Miller v. Florida, 482 U.S. 423, 424 (1987). At the time the act was committed, the presumptive sentence under Florida law would have been 3.5-4.5 years; sentences within the guideline were non-appealable, but departures from the presumptive sentence required clear and convincing reasons and were subject to appeal. Id. New sentencing guidelines went into effect on July 1, 1984, Id. at 427, under which the presumptive sentence was now 5.5-7 years. Miller was convicted in August 1984, and sentenced October 2, 1984. Id. at 426-27. The sentencing court applied the new sentencing guidelines instead of those in effect when the

crime was committed, and Miller was sentenced to 7 years in prison. Id. at 424. Because this sentence was within the new guideline, the judge did not need to articulate clear and convincing reasons and the sentence was not subject to appeal, whereas a seven-year sentence under the old standards would have required this showing and have been appealable.

This Court reversed the conviction, holding that sentencing Miller under the revised guidelines, and not the previous ones, violated the *ex post facto* clause of the federal constitution. After articulating the *Weaver* test for *ex post facto* violations, this Court held that "application of the revised guidelines law in petitioner's case clearly satisfies this standard." Id. at 430. "[T]he statute in effect at the time petitioner acted did not warn him that Florida prescribed a 5-1/2 to 7 year presumptive sentence for that crime." Id. at 431.

In this case, nothing in Minnesota law at the time of Petitioner's 1986 offense, nor at the time of his conviction, nor at the time of his sentencing, remotely suggested he would be subject to any weapons restrictions beyond the time of his probation. This restriction was imposed only on those convicted of "crimes of violence," and Petitioner's crime would not be so defined until the following year. Just as retroactive application of new sentencing guidelines to Miller, consequently disadvantaging him, violated the *ex post facto* clause, so to does retroactively defining Petitioner's crime as a "crime of violence" and wrongly subjecting him to a ten-year weapons ban. The Minnesota Court of Appeals decision ignored this.

This Court's decision in Lynce v. Mathis, 519 U.S. 433 (1997) is also instructive. There, beginning in 1983, Florida created a complex system of granting prisoners

early-release credits at times of overcrowding. Id. at 435. In the 1980s, defendant Lynce had been convicted of attempted murder and sentenced to 22 years' imprisonment, but by 1992, had accumulated sufficient credits to be released, and was released. Id. at 435-36. Shortly after his release, Florida amended its early-release credits statute, and the Florida Attorney General interpreted the law as retroactively revoking certain credits of a kind Lynce had been awarded. Id. at 436. As a consequence, Lynce was rearrested and reimprisoned. Id.

This Court overturned this outcome, asking "the essential inquiry demanded by the Ex Post Facto Clause: whether the cancellation of ... credits had the effect of lengthening petitioner's period of incarceration." Id. at 442-43. This Court held that the 1992 revision to the credits statute "unquestionably disadvantaged [Lynce] because it resulted in his rearrest and prolonged his imprisonment" Id.

at 446-47. In particular, the Lynce Court stated that the 1992 revision violated *ex post facto* principles because "it made ineligible for early release a class of prisoners who were previously eligible." Id. at 447.

Here, Minnesota claims that Petitioner was rendered "ineligible" to possess firearms as a result of the 1987 amendment which classified drug offenses as "crimes of violence." Stripping Petitioner of his right to possess firearms, and subjecting him to criminal sanctions for such possession, clearly disadvantaged him. There is no question that persons convicted in Minnesota for drug offenses committed in 1987 or after have committed "crimes of violence" and are thus subject to the ten-year ban following completion of probation. However, Petitioner was not convicted "in 1987 or after;" he was convicted in 1986. Consequently, Petitioner has experienced both a retroactive application of law, imposing additional penalties for conduct

for which he had already been convicted, and a resulting disadvantage. All elements of an *ex post facto* violation are therefore present, but the Minnesota Court of Appeals ruled to the contrary.

Finally, in what may be the most directly on-point of the trio of cases cited this Court's decision in Johnson v. United States, 529 U.S. 694 (2000), demonstrates precisely the sort of ruling the Minnesota Court of Appeals could have and should have made, but did not make. In Johnson, this Court observed that in 1984, Congress had replaced most parole with supervised release. Johnson, 529 U.S. at 696-97. Paragraphs (a) and (b) of 18 U.S.C. §3583 authorized imprisonment to be followed by supervised release, while paragraph (d) permitted the imposition of mandatory conditions during the release period, and paragraph (e)(3) directed that if these conditions were violated, the offender was to be reimprisoned. Id. at

697. Johnson committed a felony in October, 1993, for which he was sentenced in March, 1994 to 25 months' imprisonment and three years' subsequent supervised release. Id. He was released and began the supervised release period in August, 1995. However, he violated his conditions of release in approximately March, 1996. The district court revoked supervised release, ordered imprisonment for 18 months, and then ordered a second, 12-month, period of supervised release. Id. Although the legal authority for ordering a second period of supervised release was not clear, Id. at 698, this Court assumed it was found in 18 U.S.C. §3583 (h), which permitted such additional periods of supervised release, but whose effective date was September 13, 1994. Id. at 702.

After a thorough examination of why penalties for probation violations must be considered punishment for the original conviction, and not for the act which itself

constituted the violation, Id. at 699-701, this Court held that "to sentence Johnson to a further term of supervised release under §3583(h) would be to apply this section retroactively (and raise the remaining *ex post facto* question, whether that application makes him worse off)." Id. at 701. However, this Court avoided the constitutional issue altogether by returning to the statute itself and determining that because Congress had never specified any effective date for this provision, Congress did not intend for it to have retroactive effect and as a result, it became effective September 13, 1994. Id. at 701-02. Since Johnson had been sentenced in March, 1994, the law was not intended to apply to him, and thus *ex post facto* analysis was not applicable because no *ex post facto* situation occurred.

Here, Petitioner argued in vain to the Minnesota Court of Appeals that the Legislature had codified a canon of statutory construction directing against retroactive

application of laws absent specific language revealing that such a result was intended. See Minn. Stat. §645.21. In fact, the Minnesota Court of Appeals wholly ignored the question of retroactive application of law as an issue separate from the *ex post facto* theory in the case. Even if one argued that there was ambiguity in presenting this issue to the Court of Appeals, in Johnson, this Court turned promptly to this issue even though neither side had raised it *at all*. Johnson, 529 U.S. at 701-02. Petitioner would respectfully urge this Court to consider granting the writ of certiorari and remanding his case to the Minnesota Court of Appeals for reconsideration in light of Johnson.

There is no dispute that a State may pass laws providing prospectively for increased penalties for future conduct. If there can be a "typical" *ex post facto* case, it would involve a person convicted of a crime and consequently assigned a particular "status," e.g. the status of

"felon." Subsequently, a legislature imposes an additional limitation on those with that status, such as a ban on possessing weapons beginning on the effective date of that legislation. Thereafter, the individual is caught with a weapon, and punished. Such *ex post facto* challenges often fail because courts rule that it is later, not earlier, conduct being punished; the individual's status is not being changed, but rather persons with that status are subject to new limitations, strictly prospective in nature. This, however, is not Petitioner's case.

Unlike some states which impose weapons bans on "felons," Minnesota has instead chosen to impose these restrictions on those convicted of a "crime of violence." When Petitioner was convicted in 1986 of a drug offense, that offense was not included in the list of crimes Minnesota considered "crimes of violence." See Minn. Stat. §624.712, subd.5. At the time of this conviction, Minnesota could

legally restrict Petitioner's possession of weapons *only* as a condition of his probation. This is precisely what Minnesota did, and Petitioner satisfied this condition in 1991. At that point, his freedom to possess weapons *should have* been fully restored.

However, in 1987, the year following his conviction, Minnesota amended its "crime of violence" definition to include drug offenses such as Petitioner's. Minnesota did not specify an intent that this amendment would have retroactive effect. The result of this amendment was to subject those convicted of drug offenses to a ten-year ban on possessing weapons, beginning with their discharge from probation. It is this ten-year ban to which Minnesota subjected Petitioner, and for violating which Minnesota has now convicted and sentenced him. However, there is absolutely no way Petitioner could be subject to this ban *unless* the 1987 reclassification of drug offenses as

"crimes of violence" was made to apply retroactively to his 1986 conviction. The "status" which triggers the ten-year weapons ban, i.e., the "status" of having been convicted of a "crime of violence," did not purportedly attach to Petitioner until the year *following* his conviction, and could not so attach without constituting an *ex post facto* violation.

Petitioner fully agrees that his present conviction is for conduct occurring in 2000, namely the possession of firearms, and not for conduct occurring in 1986. Petitioner maintains, however, that his 2000 conduct was not criminal whatsoever *absent* an imposition of additional penalties in 1987 to his 1986 conviction in violation of *ex post facto* protections. Minnesota cannot constitutionally punish Petitioner for violating a weapons-possession ban to which he was never permissibly subjected.

CONCLUSION

The Petitioner has been subjected to an *ex post facto* application of the definition of "crime of violence," applying to events before the definition's amendment and significantly disadvantaging him. The Minnesota Court of Appeals' analysis of the *ex post facto* issues in this case directly conflict with the decisions not only of this Court, but also of the court of last resort in a sister State. For these reasons, Petitioner respectfully urges this Court to grant his petition for writ of certiorari and review this decision.

Dated: May 16, 2003

Respectfully submitted,

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STATE OF MINNESOTA

IN SUPREME COURT

C3-02-48

State of Minnesota,

Respondent,

Vs.

Stephen Lari Schluter,

Petitioner.

ORDER

Based upon all the files, records and proceedings herein, IT IS HEREBY ORDERED that the petition of Stephen Lari Schluter for further review be, and the same is, denied.

Dated: February 18, 2003

BY THE COURT:

Kathleen A. Blatz

Chief Justice

STATE OF MINNESOTA

IN COURT OF APPEALS

C3-02-48

State of Minnesota,

Respondent,

vs.

Stephen Lari Schluter,

Appellant.

Filed December 10, 2002

Affirmed

Toussaint, Chief Judge

Ramsey County District Court

File No. K2002901

Mike Hatch, Attorney General, Suite 500, 525 Park Street, St. Paul, MN 55103; and

Susan Gaertner, Ramsey County Attorney, Darrell C. Hill, Assistant County Attorney, Ramsey County Government Center, Suite 315, 50 West Kellogg Boulevard, St. Paul, MN 55102 (for respondent)

Kyle D. White, Suite 2314, 101 East Fifth Street, St. Paul, MN 55101 (for appellant)

Considered and decided by Toussaint, Chief Judge, Kalitowski, Judge, and Halbrooks, Judge.

SYLLABUS

The statutory amendment that extended the prohibition against possessing firearms to those convicted of felony controlled substance offenses committed before the effective date of the amendment did not violate the Ex Post Facto Clauses of the Minnesota or United States Constitutions.

OPINION

TOUSSAINT, Chief Judge

Appellant Stephen Lari Schluter appeals from his conviction of felon in possession of a firearm. Because the statute as amended does not violate the prohibition against ex post facto laws, and because Schluter voluntarily consented to the search of his home, we affirm.

FACTS

In 1986, appellant Stephen Lari Schluter pleaded guilty and was sentenced for felony possession of LSD with intent to distribute. His 21-month sentence was stayed, and he was discharged from probation in 1991.

On September 10, 2000, St. Paul police officers responding to a "shots fired call" were approached by Karen Pluff, who claimed that Schluter aimed a pistol at her and shot at her vehicle earlier that evening. She described Schluter's vehicle and gave his name, description, and address. The information was broadcast to other squad cars.

Officer Michael Conroy was the first to respond to the call and arrive at Schluter's home. He approached the front of the home while other officers went to the rear of the house to secure the premises. Through the window, Conroy observed Schluter and his wife sitting on a couch watching television. The officer entered the porch and knocked on the door. Schluter answered the door, and Conroy, fearing that Schluter might have a gun, instructed Schluter to turn around and put his hands on top of his head for a pat search. The officers handcuffed Schluter and placed him in the back seat of the squad car.

Conroy then took a couple of steps inside the doorway to talk to Schluter's wife, who was still sitting on the couch. She asked what the officers were doing there, and before Conroy could reply, she volunteered that her husband had been with her since 8:30 p.m. and had loaned his car to

Derrick Schumacher. When Conroy asked her if there were any weapons in the home, she replied in the negative.

Meanwhile, Officer Degree asked Schluter, who was still in the squad car, the same question. Schluter told him that he had an SKS assault rifle and a double-barreled shotgun behind the couches, and that the officer could search for them because they were not illegal. Degree went into the home and informed Conroy about the firearms. When Conroy shared this information with Mrs. Schluter, she showed him the rifle behind the back cushion, and he later observed the double-barreled shotgun laying on the floor between the wall and the couch.

Degree obtained a consent-to-search form and returned to the squad car. Degree let Schluter out of the squad car, uncuffed him, and read the form to him. Schluter signed it. A subsequent search of the home revealed (1) some twelve-gauge shotgun ammunition, (2) an empty Uzi assault rifle box, (3) an old-style flintlock rifle, and (4) a magazine for a semi-automatic pistol. The police never found the pistol used to shoot Pluff's car.

Conroy testified that throughout the search Mrs. Schluter remained in the house. However, Mrs. Schluter testified that she was placed in a separate squad car facing

her husband. She further claims that she was not fully dressed and that her request to finish dressing was denied. According to Mrs. Schluter, when her husband signed the consent-to-search form, she was allowed to go back into the house. But by that time, the police had already laid out various weapons and tagged them for inventory.

Schluter testified that he was upset that his wife was not allowed to dress. According to Schluter, officers asked him three or four times to sign the consent form, and, in the meantime, the officers were entering the home. Schluter also testified that he signed the consent form only after he was told that his wife was going to jail and that his children, who were in their rooms sleeping, would be sent to child protection.

After doing a background check, the police learned of Schluter's 1986 conviction for possession of LSD with intent to sell. As a result, he was charged with felony possession of a firearm by an ineligible person under Minn. Stat. §624.713 (2000). Schluter was never charged with the shooting at Pluff's vehicle.

Following a court trial, Schluter was found guilty, convicted, and sentenced for felon in possession of a firearm. His 60-month sentence was stayed and he was placed on

probation for 15 years. On appeal, Schluter challenges the constitutionality of section 624.713 as applied to him, and the finding of the voluntariness of the consent to search his home.

ISSUES

I. Does Minn. Stat. §624.713, subd. 1(b) (2000), as applied to appellant, who was convicted in 1986 of a felony controlled substance offense, violate the federal or state constitutional prohibitions against ex post facto laws?

II. Did the district court err in finding that appellant's consent to search his residence was voluntary?

ANALYSIS

I.

Ex Post Facto Violation

Schluter argues that, as applied to him, the 2000 felon-in-possession-of-a-firearm statute violates the Ex Post Facto Clause by retroactively increasing his punishment for his 1986 conviction for possession of controlled substances.

In evaluating constitutional challenges, the interpretation of statutes is a question of law. In re Blilie, 494 N.W.2d 877, 881 (Minn. 1993). Minnesota statutes are presumed constitutional and will be declared

unconstitutional "only when absolutely necessary." In re Haggerty, 448 N.W.2d 363, 364 (Minn. 1989)(citing City of Richfield v. Local No. 1215, 276 N.W.2d 42, 45 (Minn. 1979)).

Both the United States and Minnesota Constitutions prohibit the enactment of ex post facto laws. U.S. Const. art. I, § 10; Minn. Const. art. I, § 11. An ex post facto law "renders an act punishable in a manner in which it was not punishable when it was committed." Starkweather v. Blair, 245 Minn. 371, 386, 71 N.W.2d 869, 879 (1955) (footnote omitted). An ex post facto law is one that applies to events occurring before its enactment, and disadvantages the offender affected by it. Weaver v. Graham, 450 U.S. 24, 29, 101 S. Ct. 960, 964 (1981). More specifically, a law violates the Ex Post Facto Clause if it: (1) punishes as a crime an act which was innocent when committed, (2) increases the burden of punishment for a crime after its commission, or (3) deprives one charged with a crime of a defense that was available when it was committed. Collins v. Youngblood, 497 U.S. 37, 42, 110 S. Ct. 2715, 2719 (1990).

The challenged statute, Minn. Stat. § 624.713, subd. 1(b) (2000), prohibits individuals found guilty of a "crime of violence" from possessing a firearm for ten years after their

civil rights have been restored. "Crime of violence" is defined by Minn. Stat. §624.712, subd. 5 (2000). When Schluter was convicted in 1986 of possession of controlled substances, controlled substance offenses were not defined as "crimes of violence." See Minn. Stat. § 624.712, subd. 5 (1986). In 1987, however, the Minnesota Legislature amended the definition of the term "crime of violence" in the challenged statute to include violations of chapter 152. 1987 Minn. Laws ch. 276, § 3. Schluter claims that applying that amendment to him based on his 1986 conviction under chapter 152 violates the prohibition against ex post facto laws because (1) the legislature failed to instruct that the statute was to have retroactive effect, (2) it increases his punishment for the 1986 crime, and (3) it significantly disadvantages him.

Whether Minn. Stat. §624.713, subd.1(b), as amended by Minn. Stat. §624.712, subd. 5 (1987), can be applied to persons whose chapter 152 offenses were committed prior to the amended statute's effective date is an issue of first impression in Minnesota. However, several other state and federal courts have held that similar statutes prohibiting felons from carrying weapons may

constitutionally be applied to persons who committed the felonies prior to the statutes' effective dates.

As a preliminary matter, we do not agree with appellant's reading of and reliance on United States v. Davis, 936 F.2d 352 (8th Cir. 1991). The challenged statute in Davis was a mandatory minimum-sentence enhancement. The issue in Davis was whether to apply the civil rights restoration laws in effect at the time of conviction or at the time of discharge. Id. at 356. At the time of conviction, part of Davis's punishment was that his civil rights would only be impaired until discharge. A subsequent law delayed the restoration of rights until ten years after discharge. Unlike this case, the subsequent law in Davis was specifically aimed at enhancing the defendant's prior sentence and therefore constituted an ex post facto law. Id. at 357.

While we have no controlling precedent from the Eighth Circuit, the Fourth Circuit recently confronted an analogous case. In United States v. Mitchell, 209 F.3d 319 (4th Cir. 2000), cert. denied, 531 U.S. 849 (2000), the court held that an equivalent federal statute, which prohibited a person convicted of a misdemeanor domestic assault from possessing a firearm, applied to a person convicted of such a crime prior to the statute's effective date. Just months after

Mitchell was convicted of a misdemeanor assault and battery against his wife, Congress made it illegal for a person convicted of a misdemeanor crime of domestic assault to possess a firearm. Id. at 321. Two years later, when Mitchell was convicted of possessing a handgun, he argued that the statute violated the Ex Post Facto Clause, as applied to him, because his prior conviction occurred before the statute's amendment. Id. at 322. The court determined that it was immaterial that the defendant bought the gun and was convicted of domestic violence before the statute prohibiting firearm possession was enacted. Id. The court concluded that the illegal act was the continuing possession of the firearm, not its purchase or the defendant's previous conviction, so there was no violation of the Ex Post Facto Clauses. Id. at 322-23.

Other federal circuit courts have concurred with this analysis and have held that a law restricting felons from carrying firearms does not constitute punishment for prior convictions. See United States v. Brady, 26 F.3d 282, 291 (2d Cir. 1994) (holding that because crime of felon possessing firearm occurred after effective date of statute, it was immaterial that prior felony conviction occurred before effective date of illegal possession statute); United States v.

Huss, 7 F.3d 1444 (9th Cir. 1993) (holding that Oregon law restricting felons from carrying firearms did not constitute punishment for prior crime even though prohibition did not exist when prior crime was committed, and therefore, was not ex post facto law), overruled in part on other rounds by 161 F.3d 556 (9th Cir. 1998).

Several state courts have also addressed the constitutionality of applying later-enacted felon-in-possession laws to persons previously convicted of crimes and concluded that such laws punish the specific conduct of possession by a felon, not the underlying felony. In State v. Peters, 622 N.W.2d 918, 923 (Neb. 2001), cert. denied 533 U.S. 952 (2001), at the time of the defendant's convictions for various felonies, it was not illegal for him to possess a firearm with a barrel less than eighteen inches in length. Id. at 923-24. After his convictions, the statute was amended to prohibit convicted felons from possessing any deadly weapons. Id. The Peters court concluded that "such amendments are viewed not as further punishment for the underlying felony or felonies, but as a future prohibition on a felon's conduct." Id. at 924. We find logical and compelling the Peters court's analysis that

> [the amendment] punishes [the defendant] for the specific conduct of possession of a firearm by a person previously convicted of a felony. It does not punish [the defendant] for the underlying felony. [The defendant's] status as a felon makes the law applicable to him, but the legal consequences of his past conduct were not changed. Thus, the crime for which [the defendant] was punished was not for the earlier felonies, but for the new and separate crime of which the prior felony convictions are an element.

Id. at 925.

In the same year as Peters, the Washington Supreme Court considered a similar challenge to that state's unlawful-possession-of-a-firearm statute. State v. Schmidt, 23 P.3d 462 (Wash. 2001). As in Peters, at the time of Schmidt's felony convictions, there was no restriction on the possession of rifles by felons. Id. at 464, 466. Subsequently, the unlawful-possession-of-a-firearm statute was amended to prohibit an individual convicted of a "crime of violence" from possessing any firearm. Id. The court held that the amendments "did not punish petitioners for past offenses nor increase their punishment for prior convictions." Id. at 473. Instead, the court held, the prohibition was intended to

regulate ownership, possession, and control of firearms by those who, due to their previous felonies, were unfit to be entrusted with firearms. Id.

The Arizona Court of Appeals adopted similar reasoning in State v. Olvera, 952 P.2d 313 (Ariz. Ct. App. 1997), review denied (Ariz. Mar. 17, 1998), concluding that "[t]he amendments are not being applied to [the defendant] retroactively; they are prospective only, punishing conduct that occurred after the effective date of the amendments." Id. Courts in Iowa and Oregon have reached similar conclusions. See State v. Swartz, 601 N.W.2d 348, 351 (Iowa 1999) (holding that application of statute banning possession of firearm by felon whose underlying felony conviction occurred prior to effective date of law did not violate prohibition against ex post facto laws); State v. Lamb, 822 P.2d 143, 143 (Or. App. 1991) (holding that prohibition against defendant possessing any firearm did not constitute punishment under Ex Post Facto Clauses of Oregon or federal constitutions).

We are persuaded by the cases outlined above and conclude that the same principles govern the disposition of this case. Minn. Stat. §624.713, subd. 1(b) does not punish as a crime an act that was innocent when committed.

Schluter committed the crime of felon in possession in 2000. The illegal act was possessing the firearm in 2000, not the possession of LSD in 1986. In addition, Schluter's conviction of felon in possession does not increase the burden of punishment for his 1986 offense. Schluter's 1986 sentence, long since served, is unaffected by the change in the law; only his status due to that prior conviction has changed, making him subject to Minn. Stat. §624.713, subd. 1(b). Thus, we conclude that application of Minn. Stat. §624.713, subd. 1(b), to Schluter, as a result of his 1986 felony conviction, does not violate the prohibition against ex post facto laws.

II.

Consent to Search

The Minnesota and United States Constitutions prohibit unreasonable searches and seizures of persons and their homes. U.S. Const. amend. IV; Minn. Const. art. I, §10. Warrantless searches and seizures are per se unreasonable, subject only to recognized exceptions, such as a search conducted pursuant to consent. State v. Dickerson, 481 N.W.2d 840, 843 (Minn. 1992); State v. Hatton, 389 N.W.2d 229, 232 (Minn. App. 1986), review denied (Minn. Aug. 13, 1986). When the state relies on a defendant's

consent to search, the state has the burden to prove that the consent was given freely and voluntarily. State v. George, 557 N.W.2d 575, 579 (Minn. 1997).

On appeal, the trial court's finding of consent will not be overturned unless it is clearly erroneous. State v. Hummel, 483 N.W.2d 68, 73 (Minn. 1992). The findings will not be found to be clearly erroneous so long as there is reasonable evidence to support them. State v. Danh, 516 N.W.2d 539, 544 (Minn. 1994). This court defers to the trial court's ability to judge the credibility of witnesses. State v. Larson, 520 N.W.2d 456, 464 (Minn. App. 1994), review denied (Minn. Oct. 14, 1994).

Schluter acknowledges that he signed a consent-to-search form but claims that the circumstances surrounding his decision to sign the consent form demonstrate that his consent was involuntary. According to Schluter, prior to agreeing to sign the consent-to-search form, he was continuously asked if he would consent to the search, and each time he refused. He claims that he was upset that his wife was brought outside, partially dressed, and placed in another squad car well within his range of vision. Schluter further claims that he agreed to sign the form only after he was told by police that (1) his wife was having an affair, (2)

both he and his wife would be arrested, and (3) the children would be taken by child protective services. Schluter claims that under these circumstances, he felt coerced into consenting to the search.

The record reflects that Schluter admitted signing the consent-to-search form because he believed that he did not have anything illegal to hide. The district court found that Schluter's claim that he consented to the search out of concern for his wife and children was not credible. Furthermore, the court found that

> [h]e signed the consent to search because he had no fear of police finding a handgun and money he believed Karen Pluff had told the police about in connection with the earlier "shots fired" call. The defendant, when he learned the police wanted to search for those items, felt he had been given a "legitimate reason" for the search and consented, confident they would not find what they were looking for.

On these facts, the trial court properly found that Schluter gave his consent knowingly and voluntarily. We find no error in this finding. Because the district court's finding that

consent was voluntary is supported by reasonable evidence, it is not clearly erroneous, and we affirm.

DECISION

The district court correctly concluded that the amendment of Minnesota's felon-in possession-of-a-firearm statute to include controlled substance felonies could be applied to Schluter without violating the Ex Post Facto Clauses of the Minnesota and United States Constitutions. The court's finding that Schluter voluntarily consented to the search of his home was not clearly erroneous.

Affirmed.

624.712. Definitions

Subdivision 1. Scope. As used in sections 624.711 to 624.717, the terms defined in this section shall have the meanings given them.

Subd. 2. Pistol. "Pistol" includes a weapon designed to be fired by the use of a single hand and with an overall length less than 26 inches, or having a barrel or barrels of a length less than 18 inches in the case of a shotgun or having a barrel of a length less than 16 inches in the case of a rifle (a) from which may be fired or ejected one or more solid projectiles by means of a cartridge or shell or by the action of an explosive or the igniting of flammable or explosive substances; or (b) for which the propelling force is a spring, elastic band, carbon dioxide, air or other gas, or vapor.

"Pistol" does not include a device firing or ejecting a shot measuring .18 of an inch, or less, in diameter and commonly known as a "BB gun," a scuba gun, a stud gun or nail gun used in the construction industry or children's pop guns or toys.

Subd. 3. Antique firearm. "Antique firearm" means any firearm, including any pistol, with a matchlock, flintlock, percussion cap, or similar type of ignition system, manufactured before 1899 and any replica of any firearm

described herein if such replica is not designed or redesigned, made or remade, or intended to fire conventional rimfire or conventional centerfire ammunition, or uses conventional centerfire ammunition which is not readily available in the ordinary channels of commercial trade.

Subd. 4. Saturday night special pistol. "Saturday night special pistol: means a pistol other than an antique firearm or a pistol for which the propelling force is carbon dioxide, air or other vapor, or children's pop guns or toys, having a frame, barrel, cylinder, slide or breechblock:

(a) of any material having a melting point (liquidus) of less than 1,000 degrees Fahrenheit, or

(b) of any material having an ultimate tensile strength of less than 55,000 pounds per square inch, or

(c) of any powdered metal having a density of less than 7.5 grams per cubic centimeter.

Subd. 5. Crime of violence. "Crime of violence: includes murder in the first, second, and third degrees, manslaughter in the first and second degrees, aiding suicide, aiding attempted suicide, felony violations of assault in the first, second, third and fourth degrees, assaults motivated by bias under section 609.2231, subdivision 4, drive-by shootings, terroristic threats, use of drugs to injure or to facilitate crime, crimes committed for the benefit of a gang,

commission of a crime while wearing or possessing a bullet-resistant vest, simple robbery, aggravated robbery, kidnapping, false imprisonment, criminal sexual conduct in the first, second, third and fourth degrees, theft of a firearm, felony theft involving the intentional taking or driving of a motor vehicle without the consent of the owner or the authorized agent of the owner, felony theft involving the taking of property from a burning, abandoned or vacant building, or from an area of destruction caused by civil disaster, riot, bombing, or the proximity of battle, felony theft involving the theft of a controlled substance, an explosive, or an incendiary device, arson, in the first and second degrees, riot, burglary in the first, second, third and fourth degrees, harassment and stalking, shooting at a public transit vehicle or facility, reckless use of a gun or dangerous weapon, intentionally pointing a gun at or towards a human being, setting a spring gun, and unlawfully owning, possessing, operating a machine gun or short-barreled shotgun, and an attempt to commit any of these offenses, as each of those offenses is defined in chapter 609. "Crime of violence" also includes felony violation of the following: malicious punishment of a child; neglect or endangerment of a child; and chapter 152.

Subd. 6. Transfer. "Transfer" means a sale, gift, loan, assignment or other delivery to another, whether or not for consideration, of a pistol or semiautomatic military-style assault weapon or the frame or receiver of a pistol or semiautomatic military-style assault weapon.

Subd. 7. Semiautomatic military-style assault weapon. "Semiautomatic military-style assault weapon" means:

(1) any of the following firearms;

(i) Avtomat Kalashnikov (AK-47) semiautomatic rifle type;

(ii) Beretta AR-70 and BM-59 semiautomatic rifle types;

(iii) Colt AR-15 semiautomatic rifle type;

(iv) Daewoo Max-1 and Max-2 semiautomatic rifle types;

(v) Famas MAS semiautomatic rifle types;

(vi) Fabrique nationale FN-LAR and FN-FNC semiautomatic rifle types;

(vii) Galil semiautomatic rifle type;

(viii) Heckler & Koch HK-91; HK-98, and HK-94 semiautomatic rifle types;

(ix) Ingram MAC-10 and MAC-11 semiautomatic pistol and carbine types;

(x) Intratec TEC-9 semiautomatic pistol type;

(xi) Sigarms SIG 550SP and SIG 551SP semiautomatic rifle types;

(xii) SKS with detachable magazine semiautomatic rifle types;

(xiii) Steyr AUG semiautomatic rifle type;

(xiv) Street Sweeper and Striker-12 revolving-cylinder shotgun types;

(xv) USAS-12 semiautomatic shotgun type;

(xvi) Uzi semiautomatic pistol and carbine types; or

(xvii) Valmet M76 and M78 semiautomatic rifle types;

(2) any firearm that is another model made by the same manufacturer as one of the firearms listed in clause(1), and has the same action design as one of the listed firearms and is a redesigned, renamed, or renumbered version of one of the firearms listed in clause (1), or has a slight modification or enhancement, including but not limited to a folding or retractable stock; adjustable sight; case deflector for left-handed shooters; shorter barrel; wooden, plastic, or metal stock; larger clip size; different caliber; or a bayonet mount; and

(3) any firearm that has been manufactured or sold by another company under a licensing agreement with a manufacturer of one of the firearms listed in clause (1) entered into after the effective date of Laws 1993, chapter 326, to manufacture or sell firearms that are identical or nearly identical to those listed in clause (1), or described in clause (2), regardless of the company of production or country of origin.

The weapons listed in clause (1), except those listed in items (iii), (ix), (x), (xiv), and (xv), are the weapons the importation of which was barred by the Bureau of Alcohol, Tobacco, and Firearms of the United States Department of the Treasury in July 1989.

Except as otherwise specifically provided in paragraph (d), a firearm is not a :semiautomatic military style assault weapon" if it is generally recognized as particularly suitable for or readily adaptable to sporting purposes under United States Code, title 18, section 925, paragraph (d)(3), or any regulations adopted pursuant to that law.

Subd. 8. Included weapons. By August 1, 1993, and annually thereafter, the superintendent of the beureau of criminal apprehension shall publish a current authoritative list of the firearms included within the definition of

"semiautomatic military-style assault weapon: under this section. Dealers, purchasers, and other persons may rely on the list in complying with this chapter.

Subd. 9. Business day. "Business day" means a day on which state offices are open for normal business and excludes weekends and legal holidays.

Subd. 10. Crime punishable by imprisonment for a term exceeding one year. "Crime punishable by imprisonment for a term exceeding one year" does not include:

(1) any federal or state offense pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices; or

(2) any state offense classified by the laws of this state or any other state as a misdemeanor and punishable by a term of imprisonment of two years or less.

What constitutes a conviction of a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held. Any conviction which has been expunged, or set aside, or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this definition, unless such pardon, expungement, or restoration of civil

rights expressly provides that the person may not ship, transport, possess, or receive firearms.

Amended by Laws 1987, c. 276, § 3, eff. May 29, 1987; Laws 1991, c. 279, § 35; Laws 1993, c. 326, art. 1, §§ 23 to 26; Laws 1994, c. 636, art. 3, §§ 24 to 26; Laws 1995, c. 226, art. 2, § 32; Laws 1996, c. 408, art. 4, § 14.

Historical and Statutory Notes

1987 Legislation

The 1987 amendment rewrote subd. 5 when previously read as set out in the main volume.

1991 Legislation

The 1991 amendment included terroristic threats within the definition of "crime of violence" in subd. 5.

Laws 1991, c. 279, § 42, provides in part that §§ 1 to 5, 9, 22, 23, 25, and 29 to 36, are effective August 1, 1991, and apply to offenses committed on or after that date.

1993 Legislation

The 1993 amendment in subd. 5 defining "crime of violence" substituted "theft of a firearm" for "felonious theft" and included unlawfully owning, possessing, operating a short-barreled shotgun; in subd. 6 defining "transfer" included semiautomatic military-style assault weapons; added subd. 7 defining "semiautomatic military-style assault weapon"; and added subd. 8 requiring annual publication of

a current authoritative list of firearms within the definition of semiautomatic military-style assault weapons.

Laws 1993, c. 326, art. 1, § 35, provides in part that §§ 23 to 25 (amending subds. 5 and 6 and adding subd. 7) are effective August 1, 1993 and apply to crimes committed on or after that date.

Laws 1993, c. 326, art. 1, § 35 also had provided that § 25 (adding subd. 7) ws to be effective May 21, 1993. Laws 1993, c. 366, § 12, amended Laws 1993, c. 326, art. 1, § 35 to provide that § 26 (adding subd. 8) is effective May 21, 1993.

Laws 1993, c. 366, § 31, provides that if not otherwise provided, the sections of this act that amend provisions of law passed during the 1993 session of the legislature take effect at the same time that the provisions that they amend take effect.

1994 Legislation

The 1994 amendment in subd. 5 inserted "assaults motivated by bias under section 609.2281, subdivision 4,"; added subd. 9 defining "business day"; and added subd. 10 defining "crime punishable by imprisonment for a term exceeding one year".

Laws 1994, c. 636, art. 3 § 47, provides in part that §§ 24, 25 and 26 (amending subd. 5 and adding subds. 9 and

10 respectively) are effective August 1, 1994, and apply to crimes committed on or after that date.

1995 Legislation

The 1995 amendment, in subd. 5, included gang-related crimes, crimes committed while wearing or possessing a bullet-resistant vest, harassment and stalking, shooting at public transit vehicles or facilities, and felony violations of neglect, endangerment, or malicious punishment of a child within the definition of "crime of violence".

Laws 1995, c. 226, art. 2, § 38, provides in part that § 32 (amending subd. 5) is effective July 1, 1995, and applies to crimes committed on or after that date.

1996 Legislation

The 1996 amendment, in subd. 5, added drive-by shootings, felony theft involving the intentional taking or driving of a motor vehicle without the consent of the owner or the authorized agent of the owner, felony theft involving the taking of property from a burning, abandoned or vacant building, or from an area of destruction caused by civil disaster, riot, bombing, or the proximity of battle, and felony theft involving the theft of a controlled substance, an explosive, or an incendiary device, to the crimes constituting a "crime of violence".

Laws 1996, c. 408, art. 4, § 16, provides in part that § 14 (amending subd. 5) is effective August 1, 1996, and applies to offenses committed on or after that date.

Notes of Decisions

Crime of violence 1

1. Crime of violence

Defendant who was previously convicted of felony possession of cocaine that later by operation of law became a misdemeanor could subsequently be prosecuted for being a "felon" in possession of a firearm; firearms restriction was based upon the nature of the offense committed by the defendant rather than the actual sentence imposed by the court, and defendant's prior felony conviction constituted a "crime of violence." State v. Featar, App.2001, 630 N.W.2d 1, review denied.

624.713. Certain persons not to have pistols or semiautomatic military-style assault weapons; penalty

Subdivision 1. Ineligible persons. The following persons shall not be entitled to possess a pistol or semiautomatic military-style assault weapon or, except for clause (a), any other firearm:

(a) a person under the age of 18 years except that a person under 18 may carry or possess a pistol or semiautomatic military-style assault weapon (i) in the actual

presence or under the direct supervision of the person's parent or guardian, (ii) for the purpose of military drill under the auspices of a legally recognized military organization and under competent supervision, , (iii) for the purpose of instruction, competition, or target practice on a firing range approved by the chief of police or county sheriff in whose jurisdiction the range is located and under direct supervision; or (iv) if the person has successfully completed a course designed to teach marksmanship and safety with a pistol or semiautomatic military-style assault weapon and approved by the commissioner of natural resources;

(b) except as otherwise provided in clause (i), a person who has been convicted of, or adjudicated delinquent or convicted as an extended jurisdiction juvenile for commtting, in this state or elsewhere, a crime of violence unless ten years have elapsed since the person has been restored to civil rights or the sentence or disposition has expired, whichever occurs first, and during that time the person has not been convicted of or adjudicated for any other crime of violence. For purposes of this section, crime of violence includes crimes in other states or jurisdictions which would have been crimes of violence as herein defined if they had been committed in this state;

(c) a person who is or has even been confined in Minnesota or elsewhere as a person who is mentally ill, mentally retarded, or mentally ill and dangerous to the public, as defined in section 253B.02, to a treatment facility, or who has ever been found incompetent to stand trial or not guilty by reason of mental illness, unless the person possesses a certificate of a medical doctor or psychiatrist licensed in Minnesota, or other satisfactory proof that the person is no longer suffering from this disability;

(d) a person who has been convicted in Minnesota or elsewhere of a misdemeanor or gross misdemeanor violation of chapter 152, or a person who is or has ever been hospitalized or committed for treatment for the habitual use of a controlled substance or marijuana, as defined in sections 152.01 and 152.02, unless the person possesses a certificate of a medical doctor or psychiatrist licensed in Minnesota, or other satisfactory proof, that the person has not abused a controlled substance or marijuana during the previous two years;

(e) a person who has been confined or committed to a treatment facility in Minnesota or elsewhere as chemically dependent as defined in section 253B.02, unless the person has completed treatment. Property rights may not be abated but access may be restricted by the courts;

(f) a peace officer who is informally admitted to a treatment facility pursuant to section 253B.04 for chemical dependency, unless the officer possesses a certificate from the head of the treatment facility discharging or provisionally discharging the officer from the treatment facility. Property rights may not be abated but access may be restricted by the courts;

(g) a person, including a person under the jurisdiction of the juvenile court who has been charged with committing a crime of violence and has been placed in a pretrial diversion program by the court before disposition, until the person has completed the diversion program and the charge of committing the crime of violence has been dismissed;

(h) except as otherwise provided in clause (ii), a person who has been convicted in another state of committing an offense similar to the offense described in section 609.224, subdivision 3, against a family or household member or section 609.2242, subdivision 3, unless three years have elapsed since the date of conviction and, during that time, the person has not been convicted of any other violation of section 609.224, subdivision 3, or 609.2242, subdivision 3, 04 a similar law of another state;

(i) a person who has been convicted in this state or elsewhere of assaulting a family or household member and who was found by the court to have used a firearm in any way during commission of the assault is prohibited from possessing any type of firearm for the period determined by the sentencing court; or

(j) a person who:

(1) has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year;

(2) is a fugitive from justice as a result of having fled from any state to avoid prosecution for a crime or to avoid giving testimony in any criminal proceeding;

(3) is an unlawful user of any controlled substance as defined in chapter 152;

(4) has been judicially committed to a treatment facility in Minnesota or elsewhere as a person who is mentally ill, mentally retarded, or mentally ill and dangerous to the public, as defined in section 253B.02;

(5) is an alien who is illegally or unlawfully in the United States;

(6) has been discharged from the armed forces of the United States under dishonorable conditions; or

(7) has renounced the person's citizenship having been a citizen of the United States.

A person who issues a certificate pursuant to this subdivision in good faith is not liable for damages resulting or arising from the actions or misconduct with a firearm committed by the individual who is the subject of the certificate.

The prohibition in this subdivision relating to the possession of firearms other than pistols and semiautomatic military-style assault weapons does not apply retroactively to persons who are prohibited from possessing a pistol or semiautomatic military-style assault weapon under this subdivision before August 1, 1994.

Subd. 1a. Ineligible to receive, ship, transport. A person presently charged with a crime punishable by imprisonment for a term exceeding one year shall not be entitled to receive, ship, or transport any pistol or semiautomatic military-style assault weapon. A violation of this subdivision is a gross misdemeanor.

Subd. 2. Penalties. A person named in a subdivision 1, clause (a), who possesses a pistol or semiautomatic military-style assault weapon is guilty of a felony and may be sentenced to imprisonment for not more than five years or to payment of a fine of not more than $10,000, or both. A person named in subdivision 1, clause (b), who possesses any type of firearm is guilty of a felony

and may be sentenced to imprisonment for not more than 15 years or to payment of a fine of not more than $30,000, or both. A person named in any other clause of subdivision 1 who possesses any type of firearm is guilty of a gross misdemeanor.

Subd. 3. Notice. (a) When a person is convicted of, or adjudicated delinquent or convicted as an extended jurisdiction juvenile for committing, a crime of violence as defined in section 624.713, subdivision 5, the court shall inform the defendant that the defendant is prohibited from possessing a pistol or semiautomatic military-style assault weapon for a period of ten years after the person was restored to civil rights or since the sentence or disposition has expired, whichever occurs first, and that it is a felony offense to violate this prohibition. The failure of the court to provide this information to a defendant does not affect the applicability of the pistol or semiautomatic military-style assault weapon possession prohibition or the felony penalty to that defendant.

(b) When a person, including a person under the jurisdiction of the juvenile court, is charged with committing a crime of violence, and is placed in a pretrial diversion program by the court before disposition, the court shall inform the defendant that: (1) the defendant is prohibited

from possessing a pistol or semiautomatic military-style assault weapon until the person has completed the diversion program and the charge of committing a crime of violence has been dismissed; (2) it is a gross misdemeanor offense to violate this prohibition; and (3) if the defendant violates this condition of participation in the diversion program, the charge of committing a crime of violence may be prosecuted. The failure of the court to provide this information to a defendant does not affect the applicability of the pistol or semiautomatic military-style assault weapon possession prohibition or the gross misdemeanor penalty to that defendant.

Amended by Laws 1991, c. 279, § 36; Laws 1992, c. 537, § 3; Laws 1993, c. 326, art. 1, § 27; Laws 1993, c. 366, § 11; Laws 1994, c. 576, §§ 55, 56; Laws 1994, c. 636, art. 3, §§ 27, 28; Laws 1995, c. 259, art. 3, § 21; Laws 1996, c. 408, art. 4, § 15; Laws 2002, c. 221, § 48.

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No. 02-1697

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2002

STEPHEN LARI SCHLUTER,

Petitioner,

vs.

STATE OF MINNESOTA,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the passage of a law which effectively creates a new crime based upon a prior qualifying offense violate the Ex Post Facto law clause contained in Art. I, § 10 of the United States Constitution when that predicate offense was not so defined at the time that it was committed?

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Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, State of Minnesota, respectfully prays that the Petition for a Writ of Certiorari be denied by this Court. The Minnesota Court of Appeals opinion is reported as State v. Schluter, 653 N.W.2d 787 (Minn. App. 2002) and is attached to the Petition as Appendix A, P.P. A2-A18.

STATEMENT OF THE CASE

Petitioner, Stephen Lari Schluter, was convicted on October 2, 1986 of Possession of LSD With Intent To Distribute in violation of Minn. Stat. §§ 152.09, Subd. 1(1), 152.02, Subd. 2, and 152.15, Subd. 1(2) (1984). He was discharged from a probationary sentence on October 1, 1991.

In 1987, the Minnesota legislature extended the definition of "crime of violence" contained in Minn. Stat. § 624.712, Subd. 5 to include felony violations of Chapter 152. See Laws of Minnesota 1987, Ch. 276, § 3. In 1994, the legislature made it a crime, effective August 1, 1994, for those individuals to possess any firearm by amending Minn. Stat. § 624.713, Subd. 1(b). See Laws of Minnesota 1994, Ch. 636, Art. 3, §§ 27 and 47.

On September 10, 2000, St. Paul Police received a citizen complaint that Petitioner had fired shots at her truck. When they went to Petitioner's house to investigate, they found two firearms hidden under a couch after he gave them consent to search. The facts underlying the discovery of the firearms, while not relevant to this Petition, are set forth in detail in the State Court opinion. See State v. Schluter, 653 N.W.2d at 788-789.

Petitioner was subsequently convicted of possessing those firearms in violation of Minn. Stat. § 624.713, Subd. 1(b) with his ineligibility created by the 1986 felony drug conviction. The Minnesota Court of Appeals affirmed his conviction, holding that there was no ex post facto violation of either the United States or Minnesota Constitutions when a criminal statute prohibiting the possession of firearms was based upon a

predicate felony committed before the statute's effective date. See State v. Schluter, 653, N.W.2d at 790-792. The Minnesota Supreme Court, pursuant to Minn. R. Crim. Proc. 29.04, declined discretionary review of this case.

REASONS WHY THE WRIT OF CERTIORARI SHOULD BE DENIED

The case at bar does not present any compelling reasons why certiorari should be granted. While a United States Constitutional issue has been presented, it is neither unsettled in nature nor does it merit further consideration.

The Minnesota courts have not misapplied any controlling principles of constitutional law nor was the case decided in a manner that conflicts with relevant decisions of this Court. Likewise, there is no conflict with other decisions that would necessitate review by this Court when other jurisdictions, both state and federal, that have decided this issue are virtually unanimous in reaching a result adverse to Petitioner.

1. Misapplication of Constitutional Principles

What constitutes an ex post facto law, as stated by this Court, has remained virtually unchanged for over 200 years. In Calder v. Bull, 3 Dall. 386 (1798), this Court provided four examples of what the ex post facto clause was designed to prevent:

> "1st. Every law that makes an action done before the passing of the law, and which was innocent when done criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different testimony, than the law required at the time of the commission of the offense, in order to convict the offender." (emphasis omitted)

Id., 3 Dall. At 390.

Subsequent decisions have announced similar criteria. An ex post facto law must apply to events occurring before its enactment and it must disadvantage the offender affected by it. Weaver v. Graham, 450 U.S. 24, 29 (1981). More specifically, to constitute an ex post facto law, a statute must: (1) punish as a crime an act which was innocent when committed; (2) increase the burden of punishment for a crime after its commission; or (3) deprive one charged with a crime of a defense that was available when it was committed. Collins v. Youngblood, 497 U.S. 37, 52 (1990). The mark of an ex post facto law is what can fairly be designated as punishment for past acts. DeVeau v. Braisted, 363 U.S. 144, 160 (1960). If, however, any restriction upon an individual occurs as a relevant incident to a regulation of a present situation, the law is not ex post facto. Id.

Applying these principles, it is readily apparent why the challenged law does not run afoul of the ex post facto clause. Using the Weaver test, the law, while based upon events occurring before its enactment, does not apply to events before its enactment. Rather, the cumulative effect of the 1987 and 1994 amendments is to simply create a new crime, i.e. possession of any firearm by a person convicted of a crime of violence, that was effective August 1, 1994. See Laws of Minnesota, Ch. 636, Art. 3, §§ 27 and 47. Petitioner's prior conviction merely places him into a status that makes this new law applicable to his future conduct, i.e. any possession of a firearm after August 1, 1994.

Likewise, the law, by itself, does not seriously disadvantage Petitioner. A defendant becomes seriously disadvantaged by this status change only if he/she engages in future unlawful conduct. Without that, the

law has no effect upon his prior conviction. Thus, there is simply no ex post facto violation under the Weaver general test.

It becomes even clearer that the law does not run afoul of the ex post facto law clause using the more specific test from Collins. The statutes of which Petitioner complains (Minn. Stat. § 624.713, Subd. 1(b) and Minn. Stat. § 624.712, Subd. 5) neither criminalizes nor punishes conduct committed before their enactment. While tied to Petitioner's status, punishment is not imposed for the prior crime, i.e. past acts, but rather for his current conduct of possessing a firearm. Any restrictions falling upon Petitioner clearly occurs as a relevant incident to regulation of a present situation "so that the ex post facto prohibitions are not brought into play". DeVeau v. Braisted, 363 U.S. at 160.

Petitioner argues that the Minnesota decision is in conflict with three recent ex post facto decisions of this court, citing Miller v. Florida, 482 U.S. 423 (1987), Lynce v. Mathis, 519 U.S. 433 (1997), and Johnson v. United States, 529 U.S. 694 (2000). See Petition, P.P. 11-19. However, in each of those cases, the challenged legislative enactment, by itself, had an affect upon the punishment imposed for the defendant's prior conviction. That is simply not present in the case at bar, for future conduct after the effective date of the legislation is necessitated before there is any affect upon Petitioner.

Petitioner also agrees that legislation which, in essence, creates a new crime prospectively applied does not violate the ex post facto law clause. See Petition, P.P. 20-21. Contrary to his claim, this is precisely Petitioner's situation. He was given a status in 1987 that

prohibited him from possessing certain types of firearms. That prohibition was extended, effective August 1, 1994, to any firearm. He possessed a firearm on September 10, 2000. An ex post facto situation is not created when Petitioner is convicted and punished for an act that occurred after the statute had been amended.

2. Conflicting Decisions Do Not Necessitate Review

Petitioner also argues that review is necessitated by State v. Trower, 629 N.W.2d 594 (S.D. 2001), a conflicting decision from the neighboring state of South Dakota. See Petition, P.P. 8-11. However, what he neglects to tell this Court is that the other jurisdictions that have passed on this issue (14 states and 6 federal circuits) have ALL decided adversely to his position.

While this was an issue of first impression in Minnesota, numerous other jurisdictions had passed upon it. The overwhelming majority of them (14 out of 15 states and 6 federal circuits) hold that a conviction for possession of a firearm by a felon does not violate the ex post facto clause when the predicate offense took place before the statute was enacted or amended. The cases are collected in Respondent's Appendix, P.P. A1-A2

Thus, Trower, the case upon which Petitioner relies, literally stands alone and is not of such magnitude that review is not necessitated.

Moreover, this Court has denied certiorari in at least six of those cases dating back to 1943. See Respondent's Appendix, P.P. A1-A2. They include United States v. Mitchell and State v. Peters, two decisions heavily relied upon by the Minnesota Court. See State v. Schluter, 653 N.W.2d at 791-792. Petitioner has presented no reasons, let alone compelling ones, why this case should not meet the same fate.

CONCLUSION

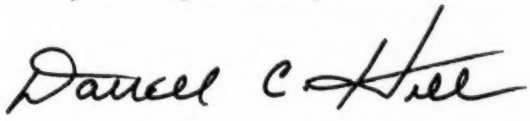
For the reasons stated herein, the Petition for a Writ of Certiorari should be denied.

Dated: June 16, 2003

Respectfully submitted,

MIKE HATCH
Minnesota Attorney General

SUSAN GAERTNER
Ramsey County Attorney



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RESPONDENT'S APPENDIX

A conviction for Possession of a Firearm by an Ineligible Person does not violate the constitutional protections against ex post facto laws, even though the predicate offense/conduct occurred before the statute was enacted or amended.

States

People v. Olvera, 191 Ariz. 75, 952 P.2d 313 (1997)
Finley v. State, 282 Ark. 146, 666 S.W.2d 701 (1984)
People v. Mills, 6 Cal App. 4th 1278, 8 Cal Rptr. 2d 310 (1992)
Landers v. State, 250 Ga. 501, 299 S.E.2d 707 (1983)
State v. Swartz, 601 N.W.2d 348 (Ia. 1999), cert. denied 528 U.S. 1167 (2000)
State v. Williams, 358 So. 2d 943 (La. 1978)
State v. Vainio, 466 A.2d 471 (Me. 1983) cert. denied 476 U.S. 1204 (1984)
People v. Tice, 220 Mich. App. 47, 558 N.W.2d 245 (1996)
State v. Peters, 261 Neb. 416, 622 N.W.2d 918 (2001), cert. denied 533 U.S. 952 (2001)
Hand v. State, 107 Nev. 577, 816 P.2d 468 (1991)
State v. Lamb, 110 Or. App. 146, 822 P.2d 143 (1991)
Jordan v. State, 56 S.W.3d 326 (Tex. Ct. App. 2001), pet. for review denied (Tex. May 15, 2002)
Dodson v. Commonwealth, 23 Va. App. 286, 476 S.E.2d 512 (1996)

State v. Schmidt and Ayers, 143 Wash. 2d 658, 23 P.3d 426 (2001)

CONTRA: State v. Trower, 629 N.W.2d 594 (S.D. 2001)

Federal Circuits

Cases v. United States, 131 F.2d 916 (1st Cir. 1942), cert. denied 319 U.S. 770 (1943)
United States v. Brady, 26 F.3d 282 (2nd Cir. 1994), cert. denied 513 U.S. 894 (1994)
United States v. Mitchell, 209 F.3d 319 (4th Cir. 2000), cert. denied 531 U.S. 849 (2000)
United States v. Sutton, 521 F.2d 1385 (7th Cir. 1975)
United States v. Huss, 7 F.3d 1444 (9th Cir. 1993), overruled diff issue by United States v. Sanchez-Rodriguez, 161 F.3d 556 (9th Cir. 1998)
Smith v. United States, 312 F.2d 119 (10th Cir. 1963)